NO. 84-249

FILED

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ROGER L. SPENCER AND SHIRLEY L. SPENCER,

Petitioners,

vs.

SOUTH CAROLINA TAX COMMISSION, CHARLES N. PLOWDEN, IN HIS CAPACITY AS CHAIRMAN OF THE SOUTH CAROLINA TAX COMMISSION, ROBERT C. WASSON, IN HIS CAPACITY AS A MEMBER OF THE SOUTH CAROLINA TAX COMMISSION AND JOHN T. WEEKS, IN HIS CAPACITY AS A MEMBER OF THE SOUTH CAROLINA TAX COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If a taxpayer asserts a cause of action to recover state income taxes in state court under a plain and adequate state remedy which allows the raising of any and all constitutional objections, may the state court properly decline to hear a cause of action under 42 U. S. C. §1983 brought in the same suit?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES CONTINUED:

Constitution and Statutes:

OPINION AND ORDER IN PRIOR PROCEEDINGS

The opinion and order in prior court proceedings have been adequately set forth in the Petition for Writ of Certiorari and nothing further is added here.

JURISDICTION

Jurisdiction is properly being sought under 28 U.S.C. §1257(3) but respondents respectfully urge that the Petition be denied since a decision of this Court is not warranted in this matter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved have been adequately set forth in the Petition for Writ of Certiorari and nothing further is added here.

STATEMENT OF THE CASE

The petitioners, the Spencers, were residents of North Carolina who earned South Carolina income

for the 1980 tax year and filed a South Carolina return which claimed nonbusiness itemized deductions. After audit such deductions were disallowed resulting in a South Carolina tax liability of $585.00. The disallowance was found by the South Carolina Supreme Court to be based upon an unconstitutional statute since such violated the Privileges and Immunities Clause, Article IV, §2, Clause 1 of the United States Constitution. However, the South Carolina Supreme Court found that the taxpayers had obtained an adequate and complete remedy by payment under protest and suit in the circuit court via §12-47-220. Since the state remedy was complete and adequate for the taxpayers' action, the court found no need to address the §1983 action and, therefore, declined to hear the matter under §1983. Such was a correct decision.

ARGUMENT SUMMARY

The issue sought to be reviewed by the petitioners is a narrow one with limited applicability only to tax refund suits sought under §1983 in state court.

South Carolina's decision is consistent with prior decisions of this Court and there is no conflict with the decisions of the state courts that have considered the use of a §1983 claim in a state tax refund matter. Since the South Carolina decision is consistent with existing law, no review by this Court is warranted.

ARGUMENT

1. South Carolina's Decision is Consistent With Prior Opinions Of This Court.

The issue petitioners seek to bring before this Court is not the broad-based assertion made by the petitioners that South Carolina has now opted to refuse to entertain a §1983 action in all matters. (See Petition for Writ of Certiorari at page 16.) Such a conclusion is incorrect and without support since it is well established that state courts have concurrent jurisdiction and may entertain actions brought under 42 U.S.C. §1983. Maine v. Thiboutot, 448 U. S. 1, 3 n. 1, 100 S. Ct. 2502, 2503 n. 1 (1980); Martinez v. California, 444 U. S. 277, 283 n. 7, 100 S. Ct. 553, 558 n. 7 (1980). The South Carolina Supreme

Court recognized such in its opinion by citing Martinez and Thiboutot. (See Petition for Writ of Certiorari, Appendix A at page 10a.) The issue before the South Carolina court was a very limited, narrow question of the effect of pursuing an adequate state tax refund remedy while also pursuing in the same suit a cause of action under 42 U.S.C. §1983. The South Carolina Supreme Court applied well accepted law that the mere existence of jurisdiction does not mean that it must be exercised and does not mean that grounds may not be shown to persuade the court to restrain its admitted jurisdiction. Kansas City Southern R. Co. v. United States, 282 U. S. 760, 51 S. Ct. 304, 306, 75 L. Ed. 684 (1951). Analogous opinions of this Court have expressly allowed state courts to decline jurisdiction of federal claims where sufficient reasons may be shown. See Douglas v. New York, N. H. and H.R.R., 279 U. S. 377 (1929), Missouri ex rel Southern Railway v. Mayfield, 340 U. S. 1 (1950) and Herb v. Pitcairn, 324 U. S. 117 (1945). In the instant case, the South

Carolina Supreme Court found sufficient reason since the taxpayers had pursued and obtained a plain, speedy and efficient remedy under §12-47-220 of the South Carolina Code of Laws of 1976, as amended, and Congress has clearly expressed its intent not to require states to entertain §1983 actions seeking refunds of state taxes. Fair Assessment In Real Estate Association v. McNary, 454 U. S. 100, 102 S. Ct. 177 (1981), demonstrated that §1983 could not be used to dispense with a taxpayer's requirement of pursuing the plain, speedy and efficient state remedies dictated by 28 U.S.C. §1341.

The Spencers present the simplistic view that since arguably the Supremacy Clause may constitutionally give Congress the authority to require a state court to hear a federal cause of action, Congress has exercised such power to its fullest extent. Such an argument ignores the clear intent expressed by Congress to limit its power by its enactment of 28 U.S.C. §1341. This section shows congressional intent to allow a

state to handle its own fiscal affairs unimpeded by federal causes of action so long as there is a plain, speedy and efficient remedy in state court. Since Congress has chosen to demand that state tax suits be pursued in state court pursuant to the state's plain, speedy and efficient remedies, it cannot logically be argued that Congress has demanded that §1983 suits be heard in state court for tax refund suits. To conclude that §1983 actions are required to be heard in state tax refund suits would be to directly contradict this Court's decision in Fair Assessment, supra, since comity would be undermined to have a federal cause of action forced upon the state judicial system.

Likewise, there is no conflict with South Carolina's decision and that of this Court in Patsy v. Board of Regents of State of Florida, 457 U. S. 496, 102 S. Ct. 2557 (1982). There this Court held that exhaustion of administrative remedies at the state level prior to instituting an action under §1983 in

federal court is not required where congressional intent is consistent with such refusal to defer jurisdiction. Patsy, supra, at 101 S. Ct. 2557, 2561. This Court then found that exhaustion requirements were specifically provided for in 42 U.S.C. §1997e and that Congress there expressed its intent to require exhaustion.

Congress has expressed its intent to require exhaustion of state remedies in a §1983 action by enactment of 28 U.S.C. §1341. Fair Assessment, supra, 102 S. Ct. at 196-197, concurring opinion of Justice Brennan. Such a view is consistent with the long held opinions of this Court acknowledging that the modes adopted by the states to enforce taxes should be interfered with as little as possible. Dows v. City of Chicago, 11 Wall. 108, 110, 20 L. Ed. 65 (1870). To require a state court to entertain a §1983 action in a state tax refund suit where there is a plain remedy creates interference where none is warranted.

South Carolina's decision is not inconsistent with Mondou v. New York, New Haven & Hartford Railroad Co., 223 U. S. 1, 32 S. Ct. 169 (1912), McKnett v. St. Louis & S. F. Ry. Co., 292 U. S. 230, 54 S. Ct. 690 (1934) or Testa v. Katt, 330 U. S. 386, 67 S. Ct. 810 (1947). Mondou, supra, held that a state could not decline to entertain a federal cause of action on the ground that the policy behind the act of Congress was inconsistent with the state's policy. Such a position merely discriminated against the federal cause of action. McKnett, supra, held that Alabama could not deny jurisdiction of a federal cause of action based solely upon the fact that the suit was brought under federal law. Again such would discriminate against the federal cause of action. Finally, Testa, supra, held that the state court could not refuse to hear a federal cause of action where the state asserted that to do so would be against the state's policy to not enforce nonforum-created penal claims. Such a ground again dis-

criminated against the federal claim. In the instant case there is no discrimination against the federal cause of action since Congress has specifically authorized by its intent expressed in 28 U.S.C. §1341 the states to exercise their discretion in hearing §1983 suits seeking state tax refunds so long as the state provides an adequate remedy. A payment under protest with a suit for refund even without interest being paid is an adequate remedy. California v. Grace Brethren Church, 457 U. S. 393, 102 S. Ct. 2498 (1982). South Carolina's refund route is adequate.

2. There Are No Conflicts On This Issue In The State Courts.

Not only do opinions of this Court not conflict with the decision of the South Carolina Supreme Court, but of the three states that have considered a state tax action in state court involving a §1983 claim, all have found the state remedy to be adequate and have exercised their discretion in not hearing the §1983 claim. South Carolina is one of the

three with Georgia and Mississippi being the other two. In Backus v. Chilivis, 236 Ga. 500, 224 S. E. 2d 370 (1976), the Georgia Supreme Court was faced with a class action challenging the tax digest for Glynn County for 1974. The tax digest was the assessed value determined for property within Glynn County. It was prepared by the H. L. Yoh Company pursuant to a contract with Glynn County. The Assessments were challenged as being unequal and, therefore, unconstitutional. The plaintiff sought to assert a claim under §1983 but was unsuccessful as the court, after noting the requirements of 28 U.S.C. §1341, held as follows:

> "We hold that the procedures provided by Georgia statutes for resolving ad valorem tax disputes bar taxpayers from instituting a §1983 action founded only on the claim that the assessments are unequal. A complete remedy for such a defect in a tax digest is already provided by state law as recognized in Tax Assessors v. Chitwood [235 Ga. 147, 218 S. E. 2d 759]. The over-riding interests of the state in an efficient, expeditious and non-disruptive resolution of ad valorem tax disputes would be seriously im-

paired, if not destroyed, by the allowance of such suits." Beckus v. Chilivis, supra, p. 374.

In State Tax Commission v. Fondren, 387 So. 2d 712 (Miss. 1980), cert. denied 450 U. S. 1040 (1981), Mississippi found that 28 U.S.C. §1341 gave the court the right to impose the exhaustion of state remedies rule. Just as in the instant case, attorneys' fees were denied since the §1983 action was properly dismissed.

CONCLUSION

No review of the decision of the South Carolina Supreme Court is warranted since it is a narrow decision correctly decided and is consistent with opinions of this Court and decisions of other state courts. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 12, 1984

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of September, 1984, three copies of a Brief In Opposition To Petition For Writ of Certiorari were mailed by depositing same in the United States Post Office at Columbia, South Carolina, with first class postage prepaid, addressed to Henry L. Parr, Jr. and Eric B. Amstutz, as Counsel of Record for Petitioners, at Post Office Box 10207, 44 East Camperdown Way, Greenville, South Carolina, 29603.

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